Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 8, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR LEAVE TO FILE EXCEPTIONS

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We here address only the question whether this Court should now entertain exceptions to a preliminary report filed by the Special Master. We oppose the motion tendered by the State parties for leave to proceed in this unusual manner.

1. The State parties themselves "recognize that in the normal course any exceptions to rulings of the Special Master would be filed after he has acted on all issues relating to intervention and tribal claims to additional water" (Motion 1). We entirely agree. The normal practice of this Court in original cases which have been referred to a Special Master reflects the traditional reluctance to permit piecemeal appeals, thereby overburdening appellate tribunals, delaying the final resolution of the case, and requiring decision of issues that may be mooted by the trial. Those considerations apply with special force to this Court. Unique circumstances

sometimes justify an exception to the usual procedure. But the State parties offer no sufficient reason here for departing from the conventional course.

2. The Special Master has not requested instructions from the Court. Compare Report of the Special Master dated October 15, 1979, in No. 65, Original, *Texas* v. *New Mexico*. Nor has the Court asked the Master now to submit his preliminary rulings for review. On the contrary, the Order referring the several motions for intervention and for further relief to the Special Master (439 U.S. 419) may fairly be read as directing him to proceed with the case to a final conclusion.

3. Until the present motion was filed, the Master and all parties have acted on this assumption. Although the formal Report is dated August 28, the Master announced at least two of the three rulings to the parties on July 16, and, since that earlier date, the parties and the Master have discussed and agreed upon the course of further proceedings. On November 7, the Special Master entered an order (appended hereto) adopting a detailed pretrial schedule with the consent of all parties. Also during this period, the United States has caused to be prepared, and distributed to all parties, preliminary reports of its experts detailing the additional water claims advanced and their justification. On the side of the claimants, these reports represent a major portion of the preparation for trial.

4. As we have just indicated, the present motion is ill-timed. It comes after a firm schedule of proceedings before the Special Master has been fixed, after much preparatory work has been completed, and after the United States has disclosed the core of its evidence for the scheduled trial. Granting the motion at

this point would be disruptive and would substantially delay resolution of the controversy. Since the trial is now set for May 1980, and is anticipated to last no more than two or three weeks, there is every reason to expect that the final report of the Special Master would reach this Court before the October Term 1980. In these circumstances, it seems wholly inappropriate for this Court now to entertain exceptions to interiocutory rulings of the Master.

5. Finally, there is no irreparable prejudice to the State parties in following normal procedures. If the Indian Tribes who have been permitted to intervene advance claims not also asserted by the United States, and the Special Master sustains some or all of such claims, and this Court ultimately holds that tribal intervention was improper—perhaps not the most likely scenario—such additional claims can readily be identified and disallowed.[1] And, similarly, should this Court disapprove the Master's ruling with respect to any or all the claims in respect of "boundary lands" or "omitted lands," there would be no difficulty in correcting the Master's findings to that extent. In sum, the Master's rulings will be fully reviewable at the end of the day if, after trial, they have any practical effect. There is no urgent reason not to await the Special Master's final report.

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[1]The Special Master has made clear his intent to keep a firm reign on the parties and to minimize any delay or inconvenience that tribal intervention might entail (Report 16):

> It is my intention to have the order of proof and examination by the moving parties structured in a logical sequence which avoids duplication or accumulation, and where they are not, the State parties will be entitled to object. In short, there is no reason to anticipate that the parallel appearances by the United States and the Indian Tribes should yield any less coordination and cooperation than I have seen from the more numerous State parties, erstwhile adversaries.

Accordingly, we respectfully submit that the motion for leave to file exceptions to the Special Master's preliminary report should be denied.

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DECEMBER 1979

APPENDIX

UNITED STATES SUPREME COURT

BEFORE THE SPECIAL MASTER

NO. 8 ORIGINAL

PRETRIAL SCHEDULE

STATE OF ARIZONA, Plaintiff,

v.

STATE OF CALIFORNIA, et al., Defendants.

November 1 -	United States turns over preliminary experts' reports; designation of expert witnesses by all parties
January 4 -	Service of requests for production of documents
January 15 -	Last day to notice depositions
February 1 -	States, Intervenors turn over preliminary reports
	1. Beginning of depositions
	2. Final designation of all witnesses
	3. Answering date for production of documents
February 29 -	End of depositions[1]
March 10 -	Parties deliver their requests for admissions

[1]Any witness testifying that he has not reached his final conclusions with regard to studies conducted in connection with this litigation may be deposed again.

March 24 - Answering date for requests for admissions

April 7 - Meeting of counsel

I. Preparation of pretrial order

(a) designate those portions of the deposition testimony which the parties shall offer at trial;

(b) list proposed exhibits, and include one copy of each;

(c) designate those admissions which the parties desire to offer in evidence at trial;

(d) list each witness the party intends to call in its case in chief and a statement as to the scope of the witnesses' testimony;

(e) delineate the issues of facts;

(f) delineate the issues of law;

(g) state all agreed upon factual matters.

II. (a) review the time schedule for all subsequent steps in the litigation;

(b) explore the possibility of additional stipulation of facts;

(c) agreement on handling of documentary evidence, including authentication of documents;

(d) examination of witnesses;

(e) daily transcripts.

III. Final listing of exhibits and objections by opposing parties

April 14 - Filing of pretrial order

April 28 - Filing of pretrial briefs

May 26 - Trial

These dates may be subject to adjustment upon a showing of good cause. Parties requesting an extension or continuance from the court shall include an affidavit fully dscribing the reasons for delay.

So Ordered.

/s/ ELBERT P. TUTTLE

SPECIAL MASTER

NOVEMBER 7, 1979